UNITED STATES
v.
B. B. SHIELD

IBLA 74-226 Decided September 5, 1974

Appeal from decision of Dent D. Dalby, Administrative Law Judge, holding certain mining claims to be null and void, Contest NM 286.

Affirmed.

Administrative Procedure: Burden of Proof--Evidence: Sufficiency--Mining Claims: Contests--Mining Claims: Hearings

> Testimony by a qualified mining engineer that he examined certain mining claims and saw no evidence of mineralization is sufficient to constitute a prima facie case of non-discovery of a valuable mineral deposit.

Administrative Procedure: Administrative Law Judges--Mining Claims: Contests--Mining Claims: Hearings

> Whether an Administrative Law Judge exceeds his authority by ordering further proof of discovery by submission of assay samples in evidence after the hearing has terminated, need not be decided when the parties acquiesce in the order and comply therewith. In such a case, the Judge is entitled to consider not only the evidence adduced at the hearing, but also the evidence adduced as a result of his order.

Administrative Procedure: Administrative Law Judges--Administrative Procedure: Decisions--Mining Claims: Contests--Mining Claims: Hearings

> An Administrative Law Judge in rendering a decision need not make a separate ruling on each finding of fact and conclusion of law. It is sufficient if the decision summarizes the controlling principles of law and the testimony of witnesses relative thereto and explains why appellants evidence was insufficient to meet the legal test for a discovery of valuable mineral.

APPEARANCES: Michael M. Rueckhaus, Esq., Albuquerque, New Mexico, for appellant; Demetrie L. Augustinos, Esq., Office of the General Counsel, Albuquerque, New Mexico, for appellee.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

B. B. Shield (Contestee), has appealed from a decision rendered by Administrative Law Judge Dalby, dated February 4, 1974, holding certain mining claims to be null and void. This decision stemmed from a hearing initiated by a complaint of the United States of America (Contestant), asserting, inter alia, that "* * * a valid mineral discovery * * * does not exist within the limits" of the designated 12 mining claims.

The essential facts follow: Donald Alexander, a mining engineer, employed by the Forest Service, testified that (1) he examined the claims on two occasions, (2) the only mineralization he saw was on B. B. Shield No. 18, (3) he saw nothing worth sampling, and (4) a person of ordinary prudence would not be justified in expending labor and means on these claims with a reasonable prospect of developing a paying mine. After appellee rested its case, appellant moved to dismiss the contest complaint on the ground that the Government had failed to make a prima facie case. Judge Dalby took the Motion to Dismiss under advisement and reserved his decision. Contestee then proceeded to put on his case. Several of the assay reports of samples taken from the various claims showed substantial values.

The hearing was held on April 11, 1973. On August 8, 1973, Judge Dalby issued an order which, in pertinent part, recited as follows:

> After reviewing the transcript and the exhibits in this proceeding, I have concluded that additional evidence is necessary to resolve the conflict existing in the record.

> The contestant's proof of invalidity of the mining claims involved in this proceeding consists primarily of the testimony of its expert witness, a mining engineer, that he examined the claims and found no significant mineralization worthy of sampling on any of them.
>
> The contestee introduced in evidence several assays of samples purportedly taken at designated points on the claims, most of which show very high mineral values.
>
> In order to resolve this conflict, the contestee is directed to designate, within 90 days of the receipt of this order, a discovery point on each of the claims and the mineral or minerals claimed to have been there discovered and the contestant is directed to take a sample at each such point, have the samples assayed for the mineral or minerals claimed to have been discovered, and have the results sent directly to me by the assayer; or, in the alternative and at the option of the contestee, the parties are directed to take a joint sample at each such point and to have portions of the samples assayed by each party for the mineral or minerals claimed to have been discovered and the results sent directly to me by the assayer. In the absence of a valid objection, the assay or assays will be received in evidence and made a part of the record in the case.
>
> Failure of either party to comply with this order will be considered in determining the weight to be accorded the evidence presented at the hearing.

Neither party objected to the terms of the order and pursuant to the Judge's order, appellant pointed out the sites for seven samples and assisted in the taking of samples by appellee's agent. These samples showed only insignificant values.

The Judge's decision of February 6, 1974, to which the appeal is directed stated in part as follows:

> In view of the contestee's inability to designate points at which samples could have been taken showing significant mineral values, I cannot credit any of the assays he introduced in evidence. The contestee has not, therefore, sustained his burden of showing

> by a preponderance of the evidence that he has discovered a valuable mineral deposit on any of the claims involved in this proceeding.
>
> The mining claims identified in the caption of this case are declared null and void.

Appellant urges three grounds for the reversal of the decision below:

1. Appellee failed to sustain its burden of proof by failing to establish a prima facie case during its case-in-chief.

2. The Judge exceeded his authority in ordering further proof by submission of assay samples in evidence after the close of all evidence by both of the parties.

3. The decision of February 4, 1974, to which the appeal is directed, does not contain findings of fact and conclusions of law.

We shall consider these issues seriatim.

In essence, appellant's first point is capsulized on page 9 of his Statement of Reasons as follows:

> * * * Alexander's testimony as to observing no mineralization is not equivalent to required testimony that there was no mineralization. His negatively-phrased testimony of nonobservation is an admission of insufficient evidence upon which to base his conclusion of no mineralization.

Moreover, appellant urges that Alexander's biodata contained in Exhibit G-2, "stated no knowledge or experience whatsoever in observation as a basis for concluding lack of mineralization."

However, that exhibit reveals that he is registered in the State of Arizona as a mining engineer, obtained a Bachelor of Science degree in Mining Engineering in 1942 from the University of Kansas, where he studied geology inter alia, was employed as a mining engineer in the private sector from January 1946 to November 1960, and since that date had been employed by the U.S. Forest Service as a mining engineer, examining claims for validity. Alexander also asserted that during his employment with the Forest Service he had recommended that a number of mining claims proceed to patent.

It is true that the recitation of Alexander's education and experience does not specifically embrace visual inspection of mining claims to determine mineral value. This is a matter of no consequence, since the Judge and this Board recognize that visual reconnaissance is not an unusual mode for making a prima facie case of non-discovery of a valuable mineral deposit in mining claim cases. Moreover, it is no more reasonable to require a mining engineer to specifically demonstrate experience in visual examination of mining claims than it would be to question a medical doctor's competence to determine the existence in an individual of hypertension, even though his medical degree obviously does not mention that ailment.

Appellant misconceives the quantum of evidence needed to establish a prima facie case of no discovery of a valuable mineral. This Board stated in United States v. Cecil R. Blomquist, Administrator of the Estate of Frank Blomquist, 7 IBLA 351, 354 (1972), as follows:

> The Government is not required to provide positive proof that there has been no discovery made or that the mining claim is non-mineral in character. The Government mineral examiner merely investigates the claims for the purpose of verifying, if possible, a discovery within the boundaries of the claim. United States v. Brian Gould, A-30990 (May 7, 1969). It is not the duty of the mineral examiner to do discovery work or to explore beyond the current workings and it is incumbent upon the mining claimant to keep discovery points available for inspection by mineral examiners. United States v. Lem A. and Elizabeth D. Houston, 66 I.D. 161, 167 (1959); United States v. Calla Mortensen, 7 IBLA 123 (1972).

See United States v. James A. Woolsey, 13 IBLA 120 (1973); United States v. James M. Zuber, 13 IBLA 193 (1973); United States v. Ramsher Mining and Engineering Co., Inc., 13 IBLA 268 (1973); United States v. William M. Goodpaster, 13 IBLA 28 (1973); United States v. Humboldt Placer Mining Co., 8 IBLA 407, 79 I.D. 709, (1972). We are satisfied that the Government made a prima facie case.

We need not decide whether the Judge exceeded his authority in ordering further proof by submission of assay samples in evidence after the close of all evidence by both the parties where appellant waived the defect by his failure to object to the Judge's order and his cooperation in carrying out the terms of that order. By appellant's acquiescence in the order, the Judge was entitled to consider not only the evidence adduced at the hearing, but also the evidence adduced as a result of his order. His ultimate finding of invalidity accords with the weight of the evidence.

Appellant contends that the decision of February 4, 1974, is defective because it "contains no findings of fact or conclusions of law with respect to any evidence offered by the Appellee in support of any or all of its changes in the Complaint and with respect to whether the Appellee sustained its burden of proof by establishing a prima facie case prior to the case-in-chief of the Appellant as Contestee."

Appellant, after having filed its motion to dismiss at the end of appellee's case-in-chief, proceeded to introduce its own evidence. A contestee who submits evidence to a hearing officer, after having demurred to the contestant's evidence, is deemed to have elected in advance not to stand upon his demurrer should it be overruled. See Aufdengarten v. Bay, 52 L.D. 176 (1927).

Appellant contends in essence that the Judge did not comply with 43 CFR 4.458-8(b), by failing to make findings of facts and conclusions of law. It is not necessary for an Administrative Law Judge to make the specific findings of fact and specific conclusions of law -- it is sufficient if his decision as a whole implicitly contains them.

We stated in United States v. Merle I. Zweifel, 11 IBLA 53, 99-100, 80 I.D. 323, 344 (1973) as follows:

> Appellants also charge error because the Judge did not make a ruling on each and every finding and conclusion as required by 43 CFR 4.452-8(b). However, the Department and the courts, have held that where an Administrative Law Judge rules, in a single sentence, on all of the proposed findings and conclusions submitted by a contestee, and the ruling on each finding and conclusion is clear, it is not necessary that the Judge make a separate ruling on each finding and conclusion. National Labor Relations Board v. Sharples Chemicals, Inc., 209 F.2d 645, 652 (6th Cir. 1954); United States v. Chas. Pfizer & Co., Inc., 76 I.D. 331, 352 (1969); United States v. Driear, 70 I.D. 10, 11 (1963).

United States v. Neil Stewart, 5 IBLA 39, 61, 79 I.D. 27, 38 (1972), epitomizes the satisfaction of the requirement:

> The decision summarized the controlling principles of law and the testimony of witnesses relative thereto and explained the reasons why the appellant's evidence was "too vague and inconclusive" to meet the legal test for a valid discovery.

Judge Dalby's decision fully satisfies those criteria.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Joan B. Thompson
Administrative Judge